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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MYKIE MILFORD aka  
MICHAEL ROSENBERG,

Plaintiff and Respondent,

v.

KELLY KINNEY,

Defendant and Appellant.

B261917

(Los Angeles County  
Super. Ct. No. BC552603 )

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Ruth Ann Kwan, Judge. Affirmed.

Kelly Kinney, in pro. per., for Defendant and Appellant.

Law Offices of R. Paul Katrinak and R. Paul Katrinak for Plaintiff and  
Respondent.

Defendant Kelly Kinney, in propria persona, appeals from the denial of her special motion to strike under Code of Civil Procedure section 425.16 (section 425.16), the so-called anti-SLAPP statute.<sup>1</sup> We conclude the trial court correctly found that Kinney failed to establish that the causes of action alleged by plaintiff Mykie Milford aka Michael Rosenberg (Milford) arose from conduct protected under section 425.16. Therefore, we affirm the trial court's order denying Kinney's special motion to strike.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The underlying complaint alleged that Kinney fraudulently obtained a \$150,000 loan from Milford and refused to pay him back. Milford is an actor and producer. In an oral agreement "based upon numerous misrepresentations by Kinney," Milford loaned Kinney \$150,000 for a web television series. Kinney "fabricated claims against Milford to avoid repaying" the loan and "repeatedly led . . . Milford to believe she would repay" it. When Milford realized that Kinney would not repay the money, he asked her if they could meet to discuss the loan. Kinney "dodged" the attempts to meet. "When she was caught and could not repay the loans, . . . Milford attempted legal and proper attempts to collect the debt." Kinney subsequently "took emails and texts from . . . Milford out of context, and fabricated a story that . . . Milford's legitimate attempts to seek repayment of the loan . . . were actually harassment." Milford alleged three causes of action: (1) breach of oral contract, (2) fraud, and (3) money had and received.

Kinney filed an anti-SLAPP motion, arguing that, by filing his complaint, Milford sought to restrain Kinney from exercising her right to report a crime to the

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<sup>1</sup> SLAPP is an acronym for "strategic lawsuit against public participation." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 280.)

police. In her motion, Kinney stated that on May 14, 2014, she reported death threats made by Milford against her and her family to the Santa Clarita Police Department. Kinney included exhibits showing that Milford was arrested and charged with making criminal threats, and that she had obtained a restraining order against Milford. According to Kinney, Milford signed an agreement to invest in her television show in return for ownership, roles for him, his son, and his best friend, and the title of executive producer. She argued that Milford's complaint was an attempt to discredit and silence her for reporting a crime. Although Kinney attached exhibits to her motion, she did not submit any declarations.

Milford opposed Kinney's motion to strike, arguing that his complaint did not concern Kinney's protected free speech or petitioning activities but sought only to hold Kinney liable for breach of contract. In support of his opposition, he submitted a declaration from his attorney, excerpts from Kinney's deposition, Milford's declaration under penalty of perjury in response to Kinney's request for a restraining order, and the misdemeanor sentencing memorandum in Milford's criminal case.

The trial court denied Kinney's special motion to strike. The court found that Kinney's alleged failure to repay a loan, fraudulent representations regarding the loan, and failure to repay money did not concern protected activities for purposes of section 425.16. The court further stated that Kinney failed to support her argument with admissible evidence. The court noted that Kinney merely attached exhibits to her motion, and those exhibits were "objectionable on several grounds, including lack of foundation and failure to authenticate." The court overruled Kinney's demurrer as to the first cause of action and sustained the demurrer with leave to amend as to the second and third causes of action. Kinney timely appealed the denial of her special motion to strike.

## DISCUSSION

Section 425.16 provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” [Citation.] It defines “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” to include ‘(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.’ (§ 425.16, subd. (e).)” (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1159 (*Aguilar*).)

“A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff’s complaint fits one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the

plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]” (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463.) “[I]f the defendant fails to satisfy the first step, the court need not address the second step, and must deny the special motion to strike. We review the denial of a special motion to strike de novo. [Citation.]” (*Aguilar, supra*, 207 Cal.App.4th at p. 1159.)

“In deciding whether the initial ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ [Citation.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) “In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party’s evidence as true and evaluate the moving party’s evidence only to determine if it has defeated the opposing party’s evidence as a matter of law. [Citation.]” (*Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 928-929.)

“The principal thrust or gravamen of the claim determines whether section 425.16 applies. [Citation.]” (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472.) “We assess the principal thrust by identifying ‘[t]he allegedly wrongful and injury-causing conduct . . . that provides the foundation for the claim.’ [Citation.] ““If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute. [Citation.]” [Citation.]’ [Citation.] ‘[T]he critical point is whether the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of

petition or free speech.’ [Citation.]” (*Park v. Board of Trustees of California State University* (2015) 239 Cal.App.4th 1258, 1269 (*Park*).)

Kinney has failed to meet her burden of making a threshold showing that the challenged causes of action arise from protected activity. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669 [“A defendant who files a special motion to strike bears the initial burden of demonstrating that the challenged cause of action arises from protected activity. [Citations.]”].) We therefore do not go on to consider the second step of whether Milford has demonstrated a probability of prevailing on the merits.<sup>2</sup> (*Aguilar, supra*, 207 Cal.App.4th at p. 1159.)

The gravamen of the complaint is Kinney’s alleged breach of an oral agreement to repay Milford \$150,000 he loaned her for a web television series. The breach of oral contract and fraud causes of action are based on the allegations that Kinney repeatedly and fraudulently promised to repay the loan but failed to do so. The third cause of action, for money had and received, similarly alleges that Kinney is indebted to Milford for \$150,000 and has failed to pay any part of the debt. Thus, the “core injury-producing conduct” on which the complaint is based is Kinney’s alleged failure to repay the loan. (*Park, supra*, 239 Cal.App.4th at p. 1269.) This conduct does not rest on protected activity within the meaning of section 425.16, subdivision (e). (See *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 190 [cause of action for breach of contract was based on nonprotected activity of the nonpayment of overdue invoices] (*Personal Court*

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<sup>2</sup> Kinney devoted most of her brief to the second step. She also argued that the trial court violated general rules of statutory and case law interpretation in denying the special motion to strike, but these general arguments are not pertinent to our review of the trial court’s denial of the special motion to strike.

*Reporters*); *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1117 [breach of contract suit based solely on defendant's alleged failure to comply with settlement agreement not based on protected activity].)

The complaint did allege that when Milford “attempted legal and proper attempts to collect the debt,” Kinney “fabricated a story” that he was harassing her. However, the complaint does not reference Kinney’s police report or seek to stop Kinney from engaging in the protected activity of making a police report against Milford. The pleadings thus do not state any facts to demonstrate that the causes of action arise from protected activity. Moreover, Kinney has not submitted any affidavits or declarations stating facts to demonstrate that the causes of action arise from protected activity. (See *Navellier, supra*, 29 Cal.4th at p. 89.)

Kinney contends that the complaint was filed after she reported Milford’s alleged threats to the police and thus was in retaliation for her protected activity. “But “the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been ‘triggered’ by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity.” [Citation.] “The anti-SLAPP statute cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is *based on* conduct in exercise of those rights.’ [Citations.]” [Citation.] . . . “In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and

(2) liability that is *based on* speech or petitioning activity.” [Citation.]”  
(*Personal Court Reporters, supra*, 205 Cal.App.4th at p. 189.)

Even if Milford’s complaint was “triggered by” Kinney’s protected activity of reporting a crime, the complaint is not *based on* this activity. (*Personal Court Reporters, supra*, 205 Cal.App.4th at p. 189.) Rather, it is based on Kinney’s alleged conduct of failing to repay the \$150,000 loan. It is therefore irrelevant that the complaint was filed after Kinney’s report to the police.

Kinney briefly argues that the trial court abused its discretion in granting Milford’s request for discovery under section 425.16, subdivision (g). However, Kinney has not supported her contention with caselaw or legal argument. “[I]ssues and arguments not addressed in the briefs on appeal are deemed forfeited. [Citations.]” (*Jones v. Jacobsen* (2011) 195 Cal.App.4th 1, 19, fn. 12.)<sup>3</sup>

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<sup>3</sup> Even if not forfeited, her argument is unmeritorious. Milford’s request for discovery explained, inter alia, that discovery was required to obtain evidence of Kinney’s alleged promises to repay the loan. Kinney had not complied with Milford’s requests for discovery or attempts to take her deposition. The trial court did not abuse its discretion in permitting Milford to obtain discovery. (See *The Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1156, 1161 [“good cause to lift the SLAPP statute’s discovery ban exists ‘[i]f the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case[.]’”].)



## **DISPOSITION**

The denial of Kinney’s special motion to strike is affirmed. Milford is entitled to costs on appeal.<sup>4</sup>

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.

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<sup>4</sup> We do not find that Kinney’s special motion to strike was “frivolous” or “solely intended to cause unnecessary delay” and therefore deny Milford’s request for attorney fees on appeal. (§ 425.16, subd. (c)(1); see *Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 395 [“[A]n appeal should be held to be frivolous only . . . when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]”].)